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Legal Transplants: A conflict of statutory law and customary Law in Papua New Guinea

by Glen Mola Pumuye

Abstract

The state of Papua New Guinea adopted the common law system of government in 1975 during independence. The genesis of most if not all its legislation can be traced back to the United Kingdom, Australia, New Zealand and other commonwealth countries. The tendency for legal transplants of legislative texts from these common law jurisdictions to sections of Papua New Guinean laws has been a constant reoccurrence. With huge texts of laws transplanted it begs the question whether these laws are coherent with existing laws and appropriate for Papua New Guinea. This paper analyses the existing *Mining Act 1992* and *Oil and Gas Act 1998* vesting ownership of minerals and petroleum in the State although these resources are located on customary land. I will use the said acts to establish the hypothesis that, in the rush to transplant legislation from Australia, this transplanted provision fails the functionality test and is not effective in Papua New Guinea. I will also try and point out the effects and solutions to redress this situation.

Keywords

Customary law, alienated land, legal transplants, functionality test

I. Introduction

As a former colony of the United Kingdom, Papua New Guinea has persisted with a Westminster system of government since before its independence¹. One of its principal challenges has been the difficulty of governing many hundreds of diverse once isolated local societies as a viable single nation². The Constitution of Papua New Guinea was adopted in 1975 and was bestowed as the supreme law in Papua New Guinea where all laws conform too.

The Papua New Guinean Constitution provides for the Hierarchy of Laws. The Constitution tops the list, followed by Organic Laws, Acts of Parliaments, Emergency Regulations, Provincial laws, adopted laws and the underlying law³. The Underlying Law consists of the Common law and Principles of Equity and the customary law of Papua New Guinea.

II. Drafting of Laws in Papua New Guinea

The task of drafting laws is vested with the Office of the Legislative Council of Papua New Guinea. The functions of the Office are—

¹ Sean Jacobs, Is PNG Westminster system worth keeping? (East Asia Forum 2013)>

<http://www.eastasiaforum.org/2013/10/05/is-pngs-westminster-system-worth-keeping/><accessed 14/04/2017.

² Stanley Owen, Papua New Guinea History and Culture, LA Provence 2017.

³ Section 9, Constitution of Papua New Guinea 1975.

- (a) the drafting of proposed laws for introduction into the Parliament; and
- (b) the drafting of amendments of proposed laws that are being considered by the Parliament; and
- (c) the drafting of subordinate legislation; and
- (d) the drafting of other instruments that are to have or be given the force of law, or are otherwise related to legislation⁴.

The mining and petroleum industry of Papua New Guinea is regulated mainly by two pieces of legislations: the Mining Act 1992 and the Oil and Gas Act 1998. These legislations expressly vest the ownership of mineral and petroleum in the State.⁵ Previously it was the Mining Act 1977 which was repealed to make way for the two Acts currently in existence. These two legislations especially pertaining to the area of resource ownership has been the transplant of Australian legislation that was drafted during the colonial era. Ongwamuhana and Regan stated that,

The law that regulates ownership of minerals in PNG is the *Mining Act 1977* (PNG). This Act consolidates previous legislation: the *Papua Mining Ordinance 1928* and the *New Guinea Mining Ordinance 1938*. Both laws derived from mining legislation in Australia and reserved to the state the ownership of all minerals. In proclaiming the ownership by the state of all minerals, the *Mining Act 1977* (PNG) largely adopted the wording of the *New Guinea Mining Ordinance 1938*.⁶

In adopting a foreign text to have direct effect in Papua New Guinea there was minimal compliance of established comparative law theories to legitimise the transplants and also ensure these adopted texts were coherent with existing legislations. Professor Xanthaki articulately in dealing with the issue of legal transplants emphasizes, "...little attention is paid to established theories of comparative law on the legitimacy of legal transplants and the constraints for drafters' choices. This creates problems of inapplicability of the transplanted law within the receiving national legal context".⁷

In the preceding paragraphs I hope to paint a vivid picture that the transplant concept was not fully developed in the legislative drafting process as a result, the statutory provision to vest ownership of minerals and petroleum in the State did not pass the functionality test to apply in Papua New Guinea.

III. Legal Transplants

Legal transplant as a word has been subject to many definition by renowned authors. Watson defines legal transplants as, "*the moving of a rule or a system of law from one country to another or from one people to another*".⁸ Cowan follows in Watson's line of thought however focuses on the implementation aspect of the definition by stating, moving of laws from one place to another in order for it to function as it did in the host jurisdictions⁹.

A legal transplant does not exist in a vacuum. There is a need to establish the type of legal transplant that will be accustomed with the receiving jurisdiction. Xanthaki identifies two types:

⁴ Section 16, Legislative Drafting Service Act 1972.

⁵ Section 6 of the Oil and Gas Act, Section, Section 5 of the Mining Act

⁶ Kibuta Ongwamuhana and Anthony Regan, Ownership of Minerals and Petroleum in Papua New Guinea: the Genesis and Nature of the Legal Controversy (1992), <https://lr.law.gut.edu.au/article/download/363/352> <accessed 6/06/2017.

⁷ Helen Xanthaki. "Legal Transplants in Legislation: Defusing the trap", *International & Comparative Law Quarterly*, 07/2008, pp.659-673.

Published by: Cambridge University Press on behalf of the British Institute of International and Comparative Law < <http://www.jstor.org/stable/20488235> <Accessed: 08/06/18.

⁸ Alan Watson, *Legal Transplants: An approach to comparative law* (University of Georgia Press, 1993) 21.

⁹ Rosaline B Cowan, 'The effects of transplanting legislation from one jurisdiction to another' (2013), *Commonwealth Law Bulletin*, Vol 39, Issue 3.

Western developed countries choose Miller's entrepreneurial or legitimacy-generating transplants and on the contrary developing countries tend to choose Miller's cost-saving or for Miller's externally dictated transplants.¹⁰

In the case of Papua New Guinea it can be reasonable concluded that a externally dictated transplant was used to adopt the provisions vesting ownership of minerals and petroleum in the State Stefanou and Xanthaki in dealing with legal transplant have elaborated,

...nevertheless drafters and legal systems do borrow from others under one requirement: functionality...in order to accept transferability of legislative technique it is imperative to identify a common factor which can serve as a functionality glue allowing transferability between laws, institutions and legislative solutions.¹¹

With the current legislations there is no common factor identifiable. These laws were enforced upon Papua New Guineans to accept it. The reason the legal transplants did not pass the functionality test is because the ownership provisions of the Mining and Oil and Gas Acts are:

a) Contrary to the Papua New Guinea constitution

The Constitution of Papua New Guinea recognises customary law as a source of law in Papua New Guinea. The Constitution also jealously guards the right to private property¹². The case of ownership of land under customary practises is one dear to all indigenous citizens. Land is a source of livelihood and sustenance creating a unique bond between the people and the land. In the renowned case of *Mabo & Others v Queensland (No 2)*¹³, "the High Court held that the doctrine of terra nullius, which imported all laws of England to a new land, did not apply in circumstances where there were already inhabitants present the source of native title was the traditional connection to or occupation of the land".

The legal transplants did not in any way, manner or form acknowledge that right. Most of the Mining and Petroleum projects existing before 1975 and today are not located on State alienated land or private freeholds. This mine pits and oil and gas wells are located on customary land usually gardening and hunting grounds¹⁴.

Table 1: Broad divisions of land tenure structure in Papua New Guinea¹⁵

	Customary Title	Alienated Land		Total Area
		State Land	Private Freehold	
Land Area	46,310,400	870,200	435,100	47,615,700
Percentage of Total	97%	2%		100%

¹⁰ Ibid(n7)

¹¹ AlBarashdi, Saleh Hamed. "The Possibility of Transplanting Western Bankruptcy Principles to Oman", in Constantin Stefanou (ed), Helen Xanthaki(ed), Drafting Legislation, A Modern Approach (Routledge 2016).

¹²Section 54 of Papua New Guinea Constitution provides for the unjust deprivation of property.

¹³ (1992) 175 CLR 1, [1992] HCA 23

¹⁴ Refer to for comprehensive maps of previous and current location of Mineral and Petroleum activities in Papua New Guinea: <http://pngchamberminpet.com.pg/mining-in-png/>.

¹⁵ Lynne Armitage, Customary Land Tenure in Papua New Guinea (2001) citing Lakau 1991:13> <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/589/armitage.pdf?sequence=1> accessed 10/07/17.

The customary ownership to land is a constitutional right. The right to unjust deprivation of property is also a constitutional right accorded to Papua New Guineans. The notion to rectify and adopt a legal transplant that contradicts the Constitution of Papua New Guinea is an error committed in the drafting process of the Mining and Petroleum legislations. To this date there has not been a legal challenge to the ownership provisions although a number of cases dealing with the matter have been dismissed in the preliminary stage and the courts were not given the opportunity to deal with the substantive case¹⁶.

The functionality scaffolding to ensure the smooth transition of the provisions vesting ownership of minerals and petroleum in the State is non-existent. Jhering, Zweigert and Kötz, believe that an essential criteria for laws to be compared and transferred from one jurisdiction to another is through functionality.¹⁷ Xanthaki elaborates further by stating the functionality required for transplants is effectiveness. Her arguments coherently links Watson's idea of laws can survive from different origins¹⁸ with Jhering, Zweigert and Kötz¹⁹ who suggest for transplanted laws to survive there must be a functionality glue to hold it in place and Zweigert and Kötz who think that basic methodological principle of all comparative law is functionality.²⁰ Xanthaki emphasizes, "*Effectiveness therefore is the connective factor that we set out to single out in this paper. It applies to drafting around the world and it unifies legislative drafters under the umbrella of a common pursuit and a common search for quality in legislation*".²¹

In light of the above, laws on resource ownership cannot be effective in Papua New Guinea if it is in direct contradiction of the Constitution. If effectiveness is to serve as the functionality criteria for transplanting of laws, one can reasonably conclude that the resource ownership provisions were adopted in contrary to established transplant criterion.

b) Contrary to the stages of the Drafting Process

Legislative drafting process has criteria to ensure laws are effective, Thornton highlights five stages in the drafting process:

1. Understanding
2. Analysis
3. Design
4. Composition and Development
5. Scrutiny and testing²²

The requirement to ensure that new laws are coherent with existing laws falls in the analysis stage of the drafting process. Thornton clearly highlights that, "*legislative proposals should be subject to careful analysis in relation to existing laws, special responsibility areas and practicality*".²³ With the construction of the ownership provisions of the mining and petroleum legislation it is questionable why customary ownership of land was not accommodated for. Before adopting a transplant it is important that, a detailed analysis of the existing laws and regulation on the subject matter is carried out. This

¹⁶ Donigi v The Independent State of PNG (unreported) Originating Summons No. 207 of 1990 and Paterson Lova & Ors v Wapula Akipe and Ors (unreported) Supreme Court Appeal 19, 32, 36 and 60 of 1991 as adopted in Kibuta Ongwamuhana and Anthony Regan, Ownership of Mineral and Petroleum in Papua New Guinea *ibid*(n 6).

¹⁷ See K Zweigert and K Sier, 'Jhering's Influence on the Development of Comparative Legal Method' (1971) 19 AJCL 215 as adopted in *Ibid* 7.

¹⁸ A. Watson, 'Legal Transplants and Law Reform' 92 (1976) *Law Quarterly Review* at 80; also see A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974); Alan Watson, 'Legal transplants and European private law', *Ius Commune Lectures on European Private*

¹⁹ *Ibid*(n 16)

²⁰ K Zweigert and H Kötz, *An Introduction to Comparative Law*, (Oxford 1998) pg 22.

²¹ H. Xanthaki, *Transferability of Legislative solutions*, C. Stefanou and H. Xanthaki (eds) (2008).

²² Helen Xanthaki (ed), 'Thornton's Legislative Drafting' (Bloomsbury 2013).

²³ *Ibid*

an important stage in the drafting process because, at this stage the drafter needed to have received all the relevant information pertaining to all laws and detailed description of what statutory laws as applied by common law exist on the precise point of the requested legislation and also on relevant neighbouring issues.²⁴ In a study by Berkowitz, Pistor and Richard on legal transplants they concluded that, “*Our analysis suggests that a good fit of foreign with domestic law may not be only a lucky coincidence, but could be enhanced by meaningful adaptation of imported laws to local conditions*”.²⁵

Due to the fact that the ownership provisions of the Mining and Petroleum legislations were contrary to the Papua New Guinea Constitution and also Thornton’s effective drafting process, it was a transplant adopted in error. In the preceding paragraphs I will highlight some of the effects of adopting a transplant that has no functional basis to substantiate it and also its conflicts with existing laws.

IV. Effects of bad legal transplants

It is very conflicting as a customary landowner to watch heavy machinery destroy customary lands used for farming, gardening and hunting. There is no just compensation on just terms because ownership of minerals and petroleum is vested in the State. The struggle to fight against the government over customary ownership of land led to the Bougainville Civil War. Civil war raged for over ten years (1988-1998). By the time the war drew to a close, an estimated 15,000-20,000 Bougainvilleans were dead and 70,000 (out of a population of 180,000) were displaced.²⁶ The Bougainville crisis was a dark time in the history of Papua New Guinea. Panguna Mine was a copper mine operated by Rio Tinto under the company Bougainville Copper Limited (BCL), that commenced production in 1972. At that time the Panguna Copper Mine was one of the largest open pit mines in the world accounting for over 40 per cent of Papua New Guinea’s total export and 17 per cent of Bougainville’s revenue²⁷. The damage on the ecosystem was immense. As articulated by McIntosh, BCL,

*discharged the open-cast tailings as cheaply as possible by dumping it into the Jaba river valley and its tributary the Kawerong...Noxious wastes including cyanides and heavy metals from the copper and gold concentration process was discharged into the river system. These have destroyed most marine life in the estuary where freshwater fish also breed*²⁸.

This all eventuated because the government and the developers ignored the customary landowners on the legislative provisions vesting ownership in the State. The environmental degradation was so bad however the mine could not be closed because the landowners had no ownership of resources that were legally on their customary land and they should have been vested with ownership rights.

Secondly the monetary benefits acquired through the extraction of Mining and Petroleum resources are very minimal. I hope to qualify the above statement with a table below that depicts five(5) Mining and Petroleum Companies operating in Papua New Guinea and how much percentage interest customary land owners are given.

²⁴ Helen Xanthaki, ‘Drafting Legislation Art and Technology of Rules for Regulation (Hart 2014) pp 44.

²⁵ Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, American Journal of Comparative Law, Vol. 51, No. 1 (Winter, 2003), pp. 163-203, Oxford University Press <<http://www.jstor.org/stable/3649143>> Accessed: 27/06/17.

²⁶ Australian Department of Foreign Affairs and Trade, Bougainville Peace Process, [undated], http://www.dfat.gov.au/geo/png/bougainville_peace_process.html (accessed 2 April 2012); “PNG: Tackling Clan Conflict,” IRIN, Humanitarian News and Analysis, 7 January 2011, <http://www.irinnews.org/Report/91559/PAPUA-NEW-GUINEA-Tackling-clan-conflict> (accessed 7/08/17)

²⁷ Joanne Wallis, “Ten Years of Peace: Assessing Bougainville’s Progress and Prospects,” *The Round Table* (2013) <http://bougainville-copper.info/mediapool/59/599247/data/Background/USAID_Bougainville-stability-study_20131010.pdf>

²⁸ A McIntosh, “The Bougainville Crisis: A South Pacific Crofters Wars (1990),” http://www.alastairmcintosh.com/articles/1990_bougainville.htm <accessed 12 June 2017.

Table 1.1

Mining and Petroleum Projects in PNG	Ownership Structure (100%)
<ul style="list-style-type: none"> • PNG LNG Project²⁹ 	ExxonMobil 33.2%
	Oil Search Limited 29%
	Kumul Petroleum Holdings 16.8%
	Santos 13.5%
	JX Nippon Oil and Gas Exploration 4.7%
	<u>LANDOWNERS 2.8%</u>
<ul style="list-style-type: none"> • Barrick Porgera³⁰ 	Barrick Niugini Ltd 95%
	Enga Provincial Government 2.5%
	<u>LANDOWNERS 2.5%</u>
<ul style="list-style-type: none"> • Tolokuma Gold Mine³¹ 	Asidokona Mining Resources Pty Limited 98%
	<u>LANDOWNERS 2%</u>
<ul style="list-style-type: none"> • Gobe Oil³² 	Oil Search Ltd 36.36%
	SH Petroleum Ltd 40.15%
	Santos 15.92%
	Cue PNG 5.57
	<u>LANDOWNERS 2.0%</u>

All this adverse effect once again reemphasizes that legal transplants has its advantages and disadvantages. However in the pursuit to minimize the disadvantages of legal transplant identifying a functional criteria or criterions to substantiate the legal transplants is important. Xanthaki's approach is pursuing effectiveness as the functionality glue can work in Papua New Guinea. So what is effectiveness? In quoting Xanthaki, effective '*means that the norm produces effects, that it does not*

²⁹ <https://pnglng.com/About/Co-venturers>>accessed 27/06/2017.

³⁰ <http://www.barrick.com/operations/porgera/default.aspx>>accessed 27/06/2017.

³¹ <https://ramumine.wordpress.com/tag/tolokuma-mine/>>accessed 27/06/2017.

³² <http://papuanosl-app.azurewebsites.net/Our-Activities/Operated-PNG-Production-Overview/Gobe.html>

become a dead letter, and 'efficient' in the sense that the norm should produce the desired effects, should not have perverse effects and should so guide conduct as to achieve the desired objective³³

The desired objective in Papua New Guinea should be to protect customary ownership of land. Land is a source of sustenance to the people who to this day use it for hunting and gardening. Kambuou accurately explains, "A subsistence farmer in Papua New Guinea lives very closely with the nature. He turns to the forest for all his basic needs and in his own primitive way learn to appreciate and value the richness the nature provides in these forests".³⁴ Agriculture dominates the rural economy of *Papua New Guinea (PNG)*. More than five million rural dwellers (80% of the *population*) earn a living from *subsistence*.³⁵ To ensure this transplanted concepts of ownership of mineral and petroleum are effective in Papua New Guinea, due emphasis should be given to customary land ownership and landowners seen as important stakeholders in the use of their land.

V. Conclusion

With the increase in knowledge centred on legal transplant and comparative law it is about time to redress the error in the Mining and Petroleum legislation in Papua New Guinea. The right to customary land is safeguarded by the Constitution and as the highest law in Papua New Guinea all laws should conform to it. The ownership provisions of the Mining and Petroleum legislation are externally dictated transplants and for it to work there must be a scaffolding that provides functionality. If effectiveness is to serve as that functionality glue the compliance with constitutional provisions must first be addressed. The continuation of this transplants is having an adverse impact in Papua New Guinea and promoting deprivation of property and unfair distribution of wealth.

Research and Limitations

Given the time and word limit to this paper I have not gone in detail in substantiating customary ownership and its place in the Papua New Guinea constitution. I would also have done a comparative study with other countries that recognise customary ownership of Land. Further research can be carried out into the ownership provisions of the mentioned legislation, the functionality test and perhaps a draft of the Mining and Petroleum legislation be produced.

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³³ Ibid(n 19)

³⁴ R.N. Kambuou, Country Report to the FAO International Technical Conference on Plant Genetic Resources, (Leipzig, 1996)><http://www.fao.org/fileadmin/templates/agphome/documents/PGR/SoW1/asia/PAPUANEW.pdf>>accessed 27/06/17.

³⁵ Michael Bourke (ed) & Tracy Harwood (ed), History of agriculture in Papua New Guinea, ANU Press. (2009)><http://www.jstor.org/stable/j.ctt24h987.12>> accessed 27/086/17.